

Client Alert

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Unruly Passengers Beware: ICAO Delivers Montreal Protocol 2014 to Enhance Enforcement Measures Against Unruly Passengers

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This month the International Civil Aviation Organization (ICAO) officially adopted a Protocol to amend the Tokyo Convention on offenses committed on aircrafts. The culmination of a four-year effort to modernize the Tokyo Convention, the Montreal Protocol 2014 makes key changes to improve airlines' ability to deal with unruly passenger incidents and enhance aviation security. Some 100 governments participated in the process that led to the Protocol, which will come into force once 22 states ratify it.

The Tokyo Convention. The Tokyo Convention, which came into effect in 1969, governs what action an airline may take to address offences and other acts that occur on board an aircraft during flight. The Convention allows the aircraft commander to take reasonable measures against an unruly passenger, including restraint, to (1) protect the safety of the aircraft, passengers, and crew, (2) maintain good order and discipline on board, and (3) enable the aircraft commander to deliver the passenger to law enforcement. Article 10 of the Convention provides immunity from liability in any proceedings for actions taken in accordance with its provisions.

It is generally thought that this 50-year-old Convention has served the aviation industry well. Nonetheless, the past five years have seen a dramatic increase in unruly passenger in-flight incidents. In fact, according to the International Air Transport Association (IATA), more than 28,000 unruly passenger incidents were reported between 2007 and 2013. These incidents included violence against crew and other passengers, harassment, and failure to follow safety instructions.

To address the rising tide of unruly passenger incidents, a Diplomatic Conference was held between March 26 and April 4, 2014. The Conference considered proposed revisions to the Tokyo Convention, aimed at ensuring that the Convention continues to work as an effective deterrent to unruly in-flight behavior.

And so the Montreal Protocol 2014 was born. The Protocol makes three key improvements to the Tokyo Convention, including the clarification of the definition of "unruly behavior," the extension of jurisdiction over in-flight incidents, and the recovery of costs stemming from unruly passenger behavior. These changes, along with the measures already being taken by airlines, ensure greater liability protection for airlines dealing with unruly passenger incidents.

What is unruly behavior? Importantly, Article VIII of the new Protocol eliminates the need for an aircraft commander to have reasonable grounds to believe that an unruly passenger is committing "a serious offence according to the penal law of the State of registration of the aircraft" in order to justify delivery to law enforcement under Article 9. All that is required under the Protocol is reasonable grounds to believe a "serious offence" has

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been committed. Serious offences could range from terroristic threats, to violent or threatening behavior against other passengers or crew, to tampering with a smoke detector.

The Protocol also encourages contracting states to take appropriate criminal, administrative, or other measures against any person who commits an in-flight offence, including “physical assault or threat to commit such assault against a crew member” or “refusal to follow a lawful instruction given by or on behalf of the aircraft commander[.]” See Protocol Article X (adding Convention Article 15(b)).

Who has jurisdiction over unruly passengers? The Protocol also extends the jurisdiction over the unruly passenger’s offense to the destination country of the flight, in addition to the country of aircraft registration. See Protocol Article IV (replacing Convention Article 3). This closes a serious Convention loophole that allowed many serious offenses to escape legal action.

Can an airline recover costs? The Protocol also adds provisions to support the recovery of significant costs arising from unruly passenger behavior. Specifically, Article XIII adds Article 18(b) to the Tokyo Convention, and provides that nothing in the Convention “shall preclude any right to seek the recovery, under national law, of damages incurred, from a person disembarked or delivered [to law enforcement] pursuant to Article 8 or 9[.]” Nevertheless, airlines may wish to be circumspect in attempting to charge unruly passengers for the high cost of holding up or diverting a flight; most passengers will not have the means to pay such a fine, and airlines may not want to build a reputation for trying to punish their own passengers.

Conclusion. The changes effected by the Protocol provide enhanced tools for airlines to handle unruly passengers and combat legal claims arising from disembarkation and delivery to law enforcement.

In 2013, a trial team from Morrison & Foerster’s San Diego office won a defense verdict in one of the only, if not the only, case where an airline defense was based on Article 10 of the Tokyo Convention. The airline argued that the Captain had reasonable grounds for his actions against the unruly passengers, who had refused to follow crew instructions and engaged in a heated verbal altercation with the crew. Plaintiffs claimed that the Captain acted unreasonably in disembarking them and reporting them to airport police.

The 2014 Protocol would have strengthened the airline’s case in at least two ways. First, the new Article 15(b) would have made even more clear to the jury that refusing a flight attendant’s instructions constitutes unruly behavior, providing additional justification for the Captain’s decision to disembark. Second, the revised Article 9 would have made clear that a Captain is not required to be an expert on every State’s penal laws in order to form a reasonable belief that a “serious offence” has been committed.

Unfortunately, the Protocol did not revise or expound on the Article 6 “reasonable grounds to believe” standard. It would have been helpful to airlines if the Protocol clarified that this was a standard deferential to the aircraft commander’s judgment and that actions not “arbitrary or capricious” are considered reasonable under the Convention. Such changes would give airlines a better shot at winning summary judgment under the Tokyo Convention, rather than being forced to go to trial over whether the Captain’s actions were reasonable.

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